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IN THE SUPREME COURT OF THE UNITED STATES

KARLA PIERCE, etc.,
Petitioner,

NOV 8 2000

v

SAC & FOX NATION OF MISSOURI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Amicus Curiae Brief of the States of Florida, Alabama, Arkansas, Connecticut, Idaho, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Texas, Utah and Wyoming in Support of Petitioner

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INTEREST OF *AMICI*

Amici are States of the Union and are entitled to immunity from suit in federal court pursuant to the Eleventh Amendment to the United States Constitution. This immunity is a fundamental aspect of State sovereignty retained by the States upon the formation of the Union. The *amici* States have a direct interest in this case because it erodes the protection afforded to them by the Eleventh Amendment. Accordingly, the States' amicus brief will focus on the first question presented in the petition:

> Whether 28 U.S.C. § 1362, a general jurisdictional statute for federal suits brought by Indian Tribes, abrogates the States' Eleventh Amendment immunity?

The Tenth Circuit's holding, if not reversed, will subject States to suit in federal court without their consent by Indian Tribes (and, presumably, others for whom the United States *could* bring suit against the State) not only for prospective injunctive relief, but also for money damages. The *amici* States fully support the argument presented in the Petition for Writ of Certiorari and join the State of Kansas in urging the Court to grant the petition or summarily reverse the decision below.

SUMMARY OF THE ARGUMENT

The Tenth Circuit held that the Eleventh Amendment does not bar an Indian Tribe's suit against a State for money damages in federal court pursuant to 28 U.S.C. § 1362 so long as the United States *could have* brought the suit on the Tribe's behalf. This holding conflicts with decisions of at least four other circuits (namely the Second, Eighth, Ninth and Eleventh Circuits) and also conflicts with decisions of this Court.

Conflict with Other Circuits' Decisions. The decision below conflicts with decisions of other circuits which hold that the Eleventh Amendment bars an Indian Tribe's suit against a State under § 1362 unless the United States *has* (rather than *could have*) brought suit on the Tribe's behalf and the Tribe's claims are identical to those raised by the United States, to wit:

- *Seneca Nation v. State of New York*, 26 F. Supp.2d 555 (W.D. N.Y. 1998), *aff'd* 178 F.3d 95 (2nd Cir. 1999) (Indian Tribe's land claims against State are barred by the Eleventh Amendment except to the extent that the United States is a party and the Tribes' claims are identical to those of the United States)

- *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997) (Indian Tribe's suit against State over rights reserved under a treaty is not barred by the Eleventh Amendment only because the United States is a party and the Tribe seeks the same relief as the United States)

- *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000) (Indian Tribe's suit against State over validity of State taxes fell within the *Ex Parte Young* exception absent which the Eleventh Amendment

would have barred the suit)

- *Miccosukee Tribe of Indians v. State Athletic Commission*, 226 F.3d 1226 (11th Cir. 2000) (Indian Tribe's suit against State over taxes is barred by Eleventh Amendment)

The decisions of these other circuits are consistent with this Court's restrictive interpretation of § 1362 and, more importantly, are consistent with the federalism principles embodied in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and its progeny. By contrast, the Tenth Circuit decision effectively abrogates the States' Eleventh Amendment immunity for suits by Indian Tribes under § 1362.

Conflict with This Court's Decisions. The Tenth Circuit's decision also conflicts with decisions of this Court, including *Seminole Tribe*, *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), and *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). The decision conflicts with *Seminole Tribe* (and its progeny) because it allows a statute enacted pursuant to an Article I power, i.e., § 1362, to abrogate the States' Eleventh Amendment immunity. The decision below conflicts with *Blatchford* because it endorses the vast expansion of *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), specifically rejected by this Court in *Blatchford*. Finally, the decision below conflicts with *Couer d'Alene* because in that case the Court held that the Eleventh Amendment bars an Indian Tribe's suit against a State except to the extent that the Tribe's claims were identical to those brought against the State by the United States.

Need to Resolve the Conflicts. The conflicts created by the decision below should be resolved by this Court because they touch on a critical aspect of State sovereignty, namely the

States' Eleventh Amendment immunity from suit in federal court. The decision below effectively abrogates that immunity in the context of suits by Indian Tribes and subjects the States to suits by the Tribes not only for prospective injunctive relief (pursuant to *Ex Parte Young*), but also to suits for money damages. The decision severely threatens the States' public fiscs. Its logic is not limited to § 1362 but also extends to other Article I-based statutes which authorize private suits against a State and under which the United States also *could* bring the suit. *See, e.g.*, 29 U.S.C. § 216(c) (authorizing Secretary of Labor to bring suit under Fair Labor Standards Act on behalf of aggrieved workers). *Cf. Alden v. Maine*, 527 U.S. 706, 759-60 (1999).

The Court should grant the Petition to resolve these important issues and reverse the Tenth Circuit's decision.

ARGUMENT

This case began as a suit filed by various Indian tribes against the State of Kansas (through the Secretary of the Kansas Department of Revenue) to enjoin collection of a general tax on distributors of motor vehicle fuel, including fuel destined for sale by retailers located on tribal lands. Asserting its Eleventh Amendment immunity, Kansas moved to dismiss. The district court denied the motion to dismiss based upon the exception created under *Ex parte Young* for prospective injunctive relief against a state official acting in violation of federal law. Pet. App. 39a, 70a-73a (979 F.Supp. at 1352-53).

On appeal, the Tenth Circuit affirmed the denial of dismissal, but did not rely on the *Ex parte Young* theory. Pet. App. 6a-10a. (213 F.3d at 572-73 n.3). Instead, the court held that pursuant to *Moe* and *Blatchford* the district court had jurisdiction under 28 U.S.C. § 1362 and that neither the Tax

Injunction Act (28 U.S.C. § 1341) nor the Eleventh Amendment barred the Tribes' suit in this case. *Id.* (213 F.3d at 572-73). Kansas timely filed a petition for writ of certiorari in this Court.

The Court should grant the Petition and review the Tenth Circuit's decision in this case because it conflicts with decisions of other circuits as well as decisions of this Court on important federal issues, specifically the scope of the States' Eleventh Amendment immunity from suit for money damages in federal court by Indian Tribes pursuant to § 1362, and suits by others pursuant to laws passed pursuant to Congressional power under Article I of the Constitution.

I. THE TENTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF OTHER CIRCUITS WHICH HOLD THAT THE ELEVENTH AMENDMENT BARS SUITS BY TRIBES AGAINST STATES UNDER 28 U.S.C. § 1362 UNLESS THE UNITED STATES *HAS* BROUGHT AN IDENTICAL ACTION AGAINST THE STATE.

The decision of the Tenth Circuit below conflicts with decisions of the Second,[1] Eighth,[2] Ninth,[3] and Eleventh

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[1] *Seneca Nation v. State of New York*, 26 F.Supp. 2d 555 (W.D.N.Y. 1998), *aff'd* 178 F. 3d 95 (2nd cir. 1999).

[2] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F. 3d 904 (8th Cir. 1997).

[3] *Agua Caliente Band of Cahuilla Indians v Hardin*, 223 F.3d 1041 (9th Cir. 2000).

Circuits[4] on an issue of great importance to the States. Specifically, under the holding of the Tenth Circuit, an Indian Tribe can avoid the Eleventh Amendment bar any time it sues a State and can allege that the United States *could have* brought the suit on behalf of the Tribe. Since the United States generally acts as trustee for the Tribes' interests, the practical result is that the Eleventh Amendment no longer bars Indian Tribes' suits against the States in federal court.

In *Seneca Nation*, the Tribe sued the State over a land claim involving alleged violation of the Non-Intercourse Act. At a time when the court was prepared to dismiss the complaint on Eleventh Amendment grounds, the United States intervened in the case. The district court held that since the United States could prosecute the claim in the absence of the Tribe and that the Tribe could intervene in such an action, the Eleventh Amendment was not a bar. *Seneca Nation*, 26 F.Supp.2d at 563-64, *aff'd* 178 F.3d at 97. However, the Second Circuit, relying on *Arizona v. California*, 460 U.S. 605 (1983),[5]

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[4] *Miccosukee Tribe of Indians v. State Athletic Commission*, 226 F.3d 1226 (11th Cir. 2000).

[5] In *Arizona v. California*, the United States intervened in the original action before the Supreme Court to adjudicate water rights on behalf of the Tribes and others. The Tribes were granted intervention over the objection of the States based on the Eleventh Amendment. This court held:

> The Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Arizona v. California, 460 U.S. 605, 614 (1983)

clarified the district court's holding, stating that:

> the State of New York retains its Eleventh Amendment immunity to the extent that the [Tribes] raise claims or issues that are not identical to those made by the United States.

Seneca Nation, 178 F. 3d at 97. The Second Circuit held that the Tribes could bring their claims *only* to the extent that they were identical to those of the United States.

In *Mille Lacs*, the Eighth Circuit was faced with a similar question. The Tribes had brought suit against the State for declaratory and injunctive relief with respect to hunting, fishing and gathering rights under a treaty. *Mille Lacs*, 124 F.3d at 910. Again, the United States intervened and the court held that the claims of the Tribes against the State were identical to those of the United States in intervention and therefore there was no Eleventh Amendment bar to the suit going forward. *Id.* at 912-13.

The *Mille Lacs* and the *Seneca Nation* decisions are consistent in their holdings that there is no Eleventh Amendment bar to an Indian Tribe's suit against a State *only* when the United States is present in the suit and *only* to the extent the Tribes' claims are identical to those of the United States. Only in that situation is "the judicial power over the controversy [] not enlarged . . . and the States' sovereign immunity protected by the Eleventh Amendment [] not compromised." *Seneca Nation*, 26 F. Supp.2d at 564 (citing *Arizona v. California*, 460 U.S. 605, 614 (1983)).

In contrast, the court below held that the Tribe could sue the State of Kansas in its own right (not under an *Ex parte Young* theory) pursuant to the general grant of jurisdiction to the

district courts in § 1362 anytime the United States *could have* brought suit on behalf of the Tribe, even if it did not. Pet. App. 6a-10a. (213 F.3d at 572-73). The conflict between the Tenth Circuit's decision in the case sub judice and the decisions of the Second Circuit (*Seneca Nation*) and the Eighth Circuit (*Mille Lacs*) is inescapable because the application of the Tenth Circuit's reasoning to those cases would have required different results. Specifically, under the Tenth Circuit's reasoning, the Tribes in *Seneca Nation* and *Mille Lacs* would not have needed the presence of the United States to avoid the Eleventh Amendment bar and even with the presence of the United States, the Tribes could have prosecuted claims that were not identical to those of the United States.

Simply put, the Tenth Circuit's decision will allow an Indian Tribe to avoid the Eleventh Amendment bar any time it sues a State in federal court and alleges that the United States *could have* brought the suit on behalf of the Tribe. In light of the broad range of issues that the United States, as trustee, is authorized to bring suit on behalf of the Tribes, the practical effect of the Tenth Circuit's decision is that there is no longer a bar to Indian Tribes' suits against the States in federal courts under the Eleventh Amendment. A good example of this can be found in the Indian gaming context where the logic of the Tenth Circuit's holding is in conflict with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).[6]

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[6] In *Seminole Tribe*, the Court held that the Eleventh Amendment barred Indian Tribes from suing unconsenting States under the remedial provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(7). Subsequently, the Chemhuevi Indian tribe brought suit against, *inter alia*, the United States for a declaratory judgment wherein the court ordered that "defendants [the United States] have a mandatory duty to prosecute this action against the State of California on plaintiffs' behalf to enforce plaintiffs' rights under IGRA." *Chemehuevi Indian Tribe v. Wilson*, 987 F.Supp. 804, 808 (N.D. Cal. 1997). *See also U.S v. Spokane Tribe*, 139

The holding of the Tenth Circuit in the case sub judice also conflicts with the recent decision of the Eleventh Circuit in *Miccosukee Tribe of Indians v. State Athletic Commission, supra*, in which the court affirmed dismissal of the Tribe's suit against a state commission on Eleventh Amendment grounds. *Id.* at 2000 WL 1288675, *7. The Eleventh Circuit, unlike the Tenth Circuit, expressly respected the State's Eleventh Amendment immunity and, as a result, barred a suit by the Tribe which sought to enjoin taxes imposed upon activities occurring on tribal land. *Id.* at *5.

Finally, in *Agua Caliente* the Ninth Circuit found it necessary to resort to the *Ex parte Young* fiction to maintain jurisdiction over a challenge to California's sales and use tax on food and beverage purchases made by non-Indians at a tribal resort located on reservation land. In that case, the district court dismissed the case on Eleventh Amendment grounds, holding that the *Ex parte Young* exception did not apply because "state taxation involved a 'core area of state sovereignty,'" and "the Tribe had an adequate remedy at law." *Agua Caliente*, 223 F.3d at 1043. On appeal, the Ninth Circuit rejected the district court's reading of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), and relied upon the *Ex parte Young* exception to find jurisdiction to hear the Tribes' tax challenge. *Agua Caliente*, 223 F. 3d at 1045-46. Clearly, without the benefit of *Ex parte Young*, the Eleventh Amendment would have been a bar to the Tribe's Suit. *Id.* at 1045. The Tenth Circuit's decision in the case sub judice

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F. 3d 1297, 1301 (9th Cir. 1998) ("[T]he United States might sue on behalf of a tribe and force the state into a compact."). Under the reasoning of the Tenth Circuit (and assuming the United States has authority to bring such a suit without conceding a "mandatory duty" to do so), the Indian Tribes could bring their own suit under IGRA in direct contravention of the Court's holding in *Seminole Tribe*.

conflicts with the decision of the Ninth Circuit because under the Tenth Circuit's reasoning, the Agua Caliente Tribe's suit would have been allowed to go forward without reliance on *Ex parte Young*.

The importance of the distinction between reliance on *Ex parte Young* and the Tenth Circuit's decision in the case sub judice is that under the *Ex parte Young* exception to the Eleventh Amendment, a plaintiff is restricted to seeking prospective injunctive relief. Under the Tenth Circuit's holding there is no such restriction and the core protection of the public fisc found in the Eleventh Amendment is lost anytime a plaintiff, either an Indian Tribe under § 1362 or any other plaintiff under a statute like the Fair Labor Standards Act, can allege that the United States *could have* brought suit on its behalf. This result is clearly inconsistent with this Court's longstanding interpretation of the Eleventh Amendment and is in direct conflict with the cases cited above.

II. THE TENTH CIRCUIT'S INTERPRETATION OF 28 U.S.C. § 1362 WAS EXPRESSLY REJECTED BY THIS COURT IN *BLATCHFORD V. NATIVE VILLAGE OF NOATAK* AND IS IN CONFLICT WITH OTHER DECISIONS OF THIS COURT WHICH HOLD THAT § 1362 IS NOT AN INDEPENDENT GROUND FOR ABROGATING THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Tenth Circuit's decision also conflicts with decisions of this Court, including *Blatchford v. Native Village of Notak, supra*. It is apparent that the court below relied on only part of the *Blatchford* decision, and as set forth below, this Court has considered and expressly rejected the argument relied upon by the court below. The Tenth Circuit held:

> Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this case. Undoubtedly after *Seminole Tribe*, the Eleventh Amendment generally bars an Indian tribe's suit in federal court against a state where the tribe's claim rests solely on Article I's Indian Commerce Clause. As the Supreme Court stated in both *Blatchford* and *Moe*, however, an Indian tribe's suit for injunctive relief against state taxation occurring on trust lands is another matter. *Blatchford* expressly recognized what *Moe* necessarily inferred from § 1362. *Blatchford* explained that in *Moe*, the Court found in § 1362:
>
> > an implication that a tribe's access to federal court to litigate federal-question cases would be at least in some respects as broad as that of the United States suing as the tribe's trustee. The "respect" at issue in *Moe* was access to federal court for the purpose of obtaining injunctive relief from state taxation.
>
> *Blatchford*, 501 U.S. at 784, 111 S.Ct. 2578 (emphasis in original) (internal citations, quotations, and brackets omitted). Accordingly, we conclude that the Eleventh Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law.

Pet. App. 6a-10a (213 F.3d at 572-73). The Tenth Circuit's analysis and holding constitutes a "vast expansion" of the reach of § 1362, one that this Court expressly rejected in *Blatchford* where it held:

> *Moe*, however, found something more in the title's "other purposes"--an implication that "a tribe's access to federal court to litigate [federal-question cases] would be

at least in some respects as broad as that of the United States suing as the tribe's trustee," 425 U.S., at 473, 96 S.Ct., at 1641 (emphasis added). The "respect" at issue in *Moe* was access to federal court for the purpose of obtaining injunctive relief from state taxation. The Tax Injunction Act, 28 U.S.C. § 1341, denied such access to persons other than the United States; we held that § 1362 revoked that denial as to Indian tribes. *Moe* did not purport to be saying that § 1362 equated tribal access with the United States' access generally, but only "at least in some respects," 425 U.S., at 473, 96 S.Ct., at 1641, or "in certain respects," *id.*, at 474, 96 S.Ct., at 1642. Respondents now urge us, in effect, to eliminate this limitation utterly--for it is impossible to imagine any more extreme replication of the United States' ability to sue than replication even to the point of allowing unconsented suit against state sovereigns. **This is a vast expansion upon *Moe*.** Section 1341, which *Moe* held § 1362 to eliminate in its application to tribal suits, was merely a limitation that Congress itself had created--committing state tax-injunction suits to state courts as a matter of comity. Absent that statute, state taxes could constitutionally be enjoined. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, n. 10, 109 S.Ct. 2304, 2312, n. 10, 105 L.Ed.2d 45 (1989). The obstacle to suit in the present case, by contrast, is a creation not of Congress but of the Constitution. A willingness to eliminate the former in no way bespeaks a willingness to eliminate the latter, especially when limitation to "certain respects" has explicitly been announced.

Blatchford, 501 U.S. at 784-85 (emphasis added).[7]

The holding of the court below constitutes an implicit finding that the Congress intended to and did abrogate the States' Eleventh Amendment immunity, if only in this narrow situation, by the passage of § 1362. In *Blatchford*, this court held directly the contrary. *Blatchford*, 501 U.S. at 788 ("[N]either under the current standard of *Dellmuth* nor under any standard in effect at the time of *Parden* was § 1362 an abrogation of state sovereign immunity."). This implicit finding itself runs afoul of the holdings in *Seminole Tribe* and its progeny that Congress cannot abrogate the States' Eleventh Amendment Immunity through a statute (such as § 1362) adopted pursuant to an Article I power.

The Tenth Circuit's holding in the case sub judice also conflicts with this Court's holding in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). In that case, which involved a dispute over ownership and control of sovereignty submerged lands, this court held that the Eleventh Amendment barred the Tribe from suing the State of Idaho, either in its own name or under the fiction of *Ex parte Young*. After the district court dismissed the case, partially relying on the Eleventh Amendment, the United States brought suit on the Tribe's behalf as trustee for approximately one third of the land covered in the Tribe's suit. *Id.* at 266 (referring to *U.S. v. Idaho*, 95 F.Supp.2d 1094 (D.Idaho 1998)).

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[7] The holding in *Moe* addressed only the applicability of the Tax Injunction Act, a creation of Congress, not the constitutional limitation found in the Eleventh Amendment. The Tenth Circuit's "vast expansion" of the holding in *Moe* arguably brings the decision of the court below into conflict with *Moe* itself, but it clearly brings the decision into conflict with *Blatchford* and other of this court's recent cases.

With respect to the core Eleventh Amendment holding that the State of Idaho could not be sued, the facts of that case are indistinguishable from the facts in the instant case in any meaningful way. The Tribe sought to sue the State in federal court for a declaration concerning the title to certain lands. The United States could have, and eventually did, bring suit as trustee to prosecute the Tribe's land claim. In the instant case, the Tribe sought to sue the State for a declaration of the invalidity of a tax. As the Tribe's trustee, the United States could have brought suit on the Tribe's behalf to enjoin the tax. In *Coeur d'Alene*, this Court held that the Eleventh Amendment barred the claim, as the court below should have. Consistent with *Arizona v. California, supra*, in this case, as in *Coeur d'Alene*, without the *actual presence* of the United States, the Tribe's claims must be barred.

The importance of these conflicts cannot be overemphasized. If the holding of the Tenth Circuit is approved, it would constitute a complete abrogation of the States' Eleventh Amendment immunity with respect to any claim by an Indian Tribe or anyone else who can claim that the United States can bring suit on his behalf. For example, this Court recently found that the Fair Labor Standards Act (FLSA) did not contain a valid abrogation of the States' sovereign immunity in state court.[8] *Alden v. Maine*, 527 U.S. 706, 712 (1999). Because the FLSA allows the Secretary of Labor to sue the State on behalf of aggrieved workers, *see* 29 U.S.C. § 216(c), the Tenth Circuit's decision would allow individual workers to sue the State because the United States could do so. Aside from creating a conflict with this Court's decision in *Alden*, the Tenth Circuit's reasoning would allow Congress to

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[8] The Plaintiffs in *Alden* were in state court because, after this court's decision in *Seminole Tribe*, their federal suit was dismissed. *See Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997).

effectively abrogate the States' Eleventh Amendment immunity by the simple mechanism of adopting language like that in § 216(c) thereby giving a private plaintiff a route around the States' immunity because the United States had the authority to sue on his behalf. This abrogation of the States' Eleventh Amendment immunity is subject to the same criticism as the holding in *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184, (1964), *overruled College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), offered by Justice Scalia in *Pennsylvania v. Union Gas Co.*:

> There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste clean-up costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them." ***If state sovereign immunity has any reality, it must mean more than this.***

Pennsylvania v. Union Gas Co., 491 U.S. 1, 44 (1989) (Scalia, J., dissenting) (emphasis supplied).

Similarly, it is little more than a verbal distinction between saying that individuals can sue states in federal court and saying the same thing, but adding at the end "if Congress has empowered the federal government to sue on the individual's behalf." By interpreting § 1362 in such a manner, the holding of the Tenth Circuit renders the holding of *Seminole Tribe* meaningless and relegates the States' Eleventh Amendment immunity to one which can be swept aside pursuant to *any* of Congress' Article I authority. This was the exact premise of the *Union Gas* decision which was overruled by this Court in *Seminole Tribe*.

Magnifying the importance of these conflicts is the fact that there is no limitation on the remedy that the newly empowered Plaintiff could seek. If forced to rely on the *Ex parte Young* exception to the States' Eleventh Amendment immunity, the putative plaintiff would be limited to prospective injunctive relief. No such limitation can be read into the holding of the Tenth Circuit which, relying on § 1362 to abrogate the States' Eleventh Amendment immunity, simply reads: "Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this case." Pet. App. at 6a-10a (213 F. 3d at 572).

CONCLUSION

The Petition should be granted and the decision below should be reversed.

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